No. 17-587

IN THE

Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,

Petitioner,

v.

JOHN GUIDO AND DENNIS RANKIN,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

As of 2009, was the Mount Lemmon Fire District a covered "employer" under the Age Discrimination in Employment Act (ADEA)?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
STATEMENT OF THE CASE 1
REASONS FOR DENYING THE WRIT 6
I. There is no conflict that warrants this Court's intervention 6
II. The question whether the ADEA's numerosity requirement applies to political subdivisions is not significant enough to merit review 11
A. The scope of the ADEA's coverage does not affect the primary conduct of political subdivisions 11
B. The question presented does not arise frequently 13
III. The Ninth Circuit's decision is correct 15
A. The plain language of the ADEA dictates that it covers all political subdivisions 15
B. The Fire District's counterarguments are unavailing 17
IV. This case does not present an appropriate vehicle for the Court to decide the question the Fire District presents 22
CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Arroyo-Pérez v. Demir Grp. Int'l,
762 F. Supp. 2d 374 (D.P.R. 2011) 14

Barnhart v. Sigmon Coal Co.,
534 U.S. 438 (2002) 10

Bennett v. Hardy,
784 P.2d 1258 (Wash. 1990) 11

Bond v. United States,
134 S. Ct. 2077 (2014) 19

Bryson v. Middlefield Volunteer Fire Dep't, Inc.,
656 F.3d 348 (6th Cir. 2011) 24

Cink v. Grant County,
635 Fed. Appx. 470 (10th Cir. 2015) 7, 14

City of Edmonds v. Oxford House, Inc.,
514 U.S. 725 (1995) 19

Clackamas Gastroenterology Assocs. v. Wells,
538 U.S. 440 (2003) 23, 24

Dep't of Hous. & Urban Dev. v. Rucker,
535 U.S. 125 (2002) 9, 10

Echevarria v. Insight Med., P.C.,
72 F. Supp. 3d 442 (S.D.N.Y. 2014) 14

EEOC v. Monclova Township,
920 F.2d 360 (6th Cir. 1990) 7

Fed. Express Corp. v. Holowecki,
552 U.S. 389 (2008) 8

Fichman v. Media Ctr.,
512 F.3d 1157 (9th Cir. 2008) 24

Fourco Glass Co. v. Transmirra Prods. Corp.,
353 U.S. 222 (1957) 18

French v. Idaho State AFL-CIO,
164 F. Supp. 3d 1205 (D. Idaho 2016) 15

Gregory v. Ashcroft,
501 U.S. 452 (1991) 19

Gross v. FBL Fin. Servs.,
557 U.S. 167 (2009) 8, 16

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,
240 U.S. 251 (1916) 22

HCSC-Laundry v. United States,
450 U.S. 1 (1981) 19

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713 F. Supp. 159 (M.D.N.C. 1988) 22

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538 U.S. 456 (2003) 20

Kelly v. Wauconda Park Dist.,
801 F.2d 269 (7th Cir. 1986) ..... *passim*

Lewis v. Humboldt Acquisition Corp.,
681 F.3d 312 (6th Cir. 2012) 8

Leykis v. NYP Holdings, Inc.,
899 F. Supp. 986 (E.D.N.Y. 1995) 17

Major League Baseball Players Ass'n v. Garvey,
532 U.S. 504 (2001) 22

Michigan v. Bay Mills Indian Cmty.,
134 S. Ct. 2024 (2014) 21

Miller v. Maxwell's Int'l Inc.,
991 F.2d 583 (9th Cir. 1993) 17

Milner v. Dep't of the Navy,
562 U.S. 562 (2011) 10, 20

Palmer v. Ark. Council on Econ. Educ.,
154 F.3d 892 (8th Cir. 1998) 7

RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639 (2012) 19

Smith v. Wilson, 705 F.3d 674 (7th Cir. 2013) 8

Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013) 6, 8, 9, 16

Va. Military Inst. v. United States, 508 U.S. 946 (1993) 22

Walters v. Metro. Educ. Enters., 519 U.S. 202 (1997) 23

Whitfield v. United States, 543 U.S. 209 (2005) 16

Statutes

29 U.S.C. § 623 2

29 U.S.C. § 626(b) 22

29 U.S.C. § 630(a) 16, 18

29 U.S.C. § 630(b) ..... *passim*

42 U.S.C. § 2000e 16

42 U.S.C. § 2000e-5(g) 22

Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 605 ..... *passim*

Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 80 Stat. 662 16

Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(1)-(2), 88 Stat. 74 2

Alaska Stat. § 18.80.220(a) 11

Alaska Stat. § 18.80.300(5) 11

Ariz. Rev. Stat. § 41-1461(6) 12

Ariz. Rev. Stat. § 41-1463(B) 12

Ark. Code § 21-3-201 12

Ark. Code § 21-3-203 12
Cal. Gov't Code § 12926(d) 11
Cal. Gov't Code § 12940(a) 11
Haw. Rev. Stat. § 378-1 11
Haw. Rev. Stat. § 378-2(a) 11
Idaho Code § 67-5902(6) 11
Idaho Code § 67-5909 11
775 Ill. Comp. Stat. 5/1-102(A) 12
775 Ill. Comp. Stat. 5/2-101(B)(1)(c) 12
775 Ill. Comp. Stat. 5/2-102(A) 12
Ind. Code § 22-9-2-1 12
Ind. Code § 22-9-2-2 12
Iowa Code § 216.6(1) 12
Iowa Code § 216.6(6) 12
Ky. Rev. Stat. § 344.030(2) 12
Ky. Rev. Stat. § 344.040 12
Mich. Comp. Laws § 37.2201(a) 12
Mich. Comp. Laws § 37.2202 12
Minn. Stat. § 363A.03(16) 12
Minn. Stat. § 363A.08 12
Mo. Rev. Stat. § 213.010(8) 12
Mo. Rev. Stat. § 213.055 12
Mont. Code § 49-2-101(11) 11
Mont. Code § 49-2-303(1) 11
Neb. Rev. Stat. § 48-1002(2) 12
Neb. Rev. Stat. § 48-1004 12
Nev. Rev. Stat. § 613.310(2) 12
Nev. Rev. Stat. § 613.310(6) 12

Nev. Rev. Stat. § 613.330(1) 12
N.D. Cent. Code § 14-02.4-02(8) 12
N.D. Cent. Code § 14-02.4-0.3 12
Ohio Rev. Code § 4112.01(A)(2) 12
Ohio Rev. Code § 4112.14 12
Or. Rev. Stat. § 659A.001(4) 11
Or. Rev. Stat. § 659A.030(1) 11
S.D. Codified Laws § 20-13-10 12
Tenn. Code § 4-21-102(5) 12
Tenn. Code § 4-21-407 12
Wash. Rev. Code § 49.44.090 11
Wis. Stat. § 111.32(6)(a) 12
Wis. Stat. § 111.321 12
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Legislative Materials

120 Cong. Rec. 8768 (1974) 20
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American Heritage Dictionary (4th ed. 2000) 15
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STATEMENT OF THE CASE

1. Respondents John Guido and Dennis Rankin began working for petitioner Mount Lemmon Fire District in 2000. Pet. App. 19a. By 2009, the two men had risen from the rank of Firefighter EMT to Captain. *Id.* They were among the most accomplished employees in the Fire District: Mr. Rankin had been employed as a firefighter and arson investigator since 1973, while Mr. Guido was a former officer in the Arizona National Guard, a certified Senior Fire Inspector, and one of the Fire District's two certified paramedics. Pls.' Rule 56.1 Statement of Facts ¶¶ 6, 9, 10, 20. At ages forty-six and fifty-four, respectively, Mr. Guido and Mr. Rankin were also the Fire District's two oldest full-time employees. *Id.* ¶¶ 16, 26, 31.

In 2009, the Fire District confronted "a budget shortfall." Pet. 8. Fire Chief Dean Barnella, planning possible budget reductions, released a memorandum in March stating that "[p]aramedics have priority" for retention in the event of personnel reductions. *See* Pls.' Rule 56.1 Statement of Facts ¶ 38; Ex. 3 to Def.'s Rule 56.1 Statement of Facts. Nonetheless, three months later, Mr. Guido and Mr. Rankin were selected for dismissal. Compl. ¶ 25.

The Fire District has maintained that it selected Mr. Guido and Mr. Rankin for termination because they had not been "participating in wildland assignments"—voluntary shifts for fighting fires in areas of natural vegetation. *See* Def.'s Rule 56.1 Statement of Facts ¶ 20. Yet one of the employees that the Fire District tapped to replace Mr. Guido and Mr. Rankin as a ranking Captain had gone on no

such assignments in the preceding two years. Pls.' Rule 56.1 Statement of Facts ¶¶ 32, 47, 62-63.

Respondents filed charges with the Equal Employment Opportunity Commission (EEOC), alleging that the Fire District, a political subdivision of the State of Arizona, had violated the Age Discrimination in Employment Act (ADEA) by firing them because of their ages. Pet. App. 3a; *see also* 29 U.S.C. § 623.

2. As originally enacted, the ADEA excluded political subdivisions from its coverage. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 11(b), 81 Stat. 605. Two categories were covered "employer[s]" under the original ADEA: first, any "person engaged in an industry affecting commerce who ha[d] twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year," and second, "any agent of such a person." *Id.* The statute, in turn, defined "person" as "one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons." *Id.* § 11(a).

When Congress amended the ADEA in 1974, it made two changes to the Act's coverage provision. First, it lowered the numerosity requirement for private entities from twenty-five employees to twenty. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28(a)(1)-(2), 88 Stat. 74 (codified as amended at 29 U.S.C. § 630(b)). Second—and central to this case—it added an additional category of "employer" lacking any reference to the statutory term "person": The amendment expressly provided

that "a State or political subdivision of a State" is "also" an employer. *Id.*

Those changes remain in effect today. Section 630(b) states in pertinent part:

> The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . . The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency . . . .

3. After reviewing respondents' charges, the EEOC issued letters of determination finding reasonable cause to believe that the Fire District had fired Mr. Guido and Mr. Rankin in violation of the ADEA. Pet. App. 3a.

4. Mr. Guido and Mr. Rankin then filed suit in the United States District Court for the District of Arizona, alleging age discrimination under the ADEA.

After a period of discovery, the Fire District moved for summary judgment. Pet. App. 18a. It argued that "the ADEA only applies to employers that have 20 or more employees," *id.* 20a, and that the Fire District had only thirteen qualifying employees during the relevant period. Def.'s Mot. for Summ. J. 7. Mr. Rankin and Mr. Guido filed a cross-motion for partial summary judgment on the issue whether the Fire District is a covered "employer" under the ADEA. Pet. App. 18a. They argued that the "clear language of the statute" demonstrates that the

ADEA has no numerosity requirement with respect to political subdivisions. *Id.* 21a. At any rate, respondents maintained that the Fire District had more than twenty employees because it listed more than twenty firefighters on its wage reports and retained still others in a volunteer capacity. *Id.* 26a-27a, 30a-31a.

The district court granted the Fire District's motion. It held that the ADEA's numerosity requirement for private entities applies to political subdivisions like the Fire District. Pet. App. 25a-26a. The district court then concluded that the Fire District had "no more than 19 qualifying employees" because only nineteen of the firefighters on the wage reports had in fact worked and been paid during the relevant period, and none of the volunteers had received substantial benefits from the Fire District. *Id.* 26a, 31a-37a.

5. Mr. Guido and Mr. Rankin appealed, supported by an EEOC amicus brief maintaining that the ADEA covers "political subdivisions of any size." C.A. Br. of the EEOC as Amicus Curiae 5.

The Ninth Circuit agreed and unanimously reversed, holding that the ADEA applies to the Fire District. Pet. App. 17a. In an opinion by Judge O'Scannlain, the court of appeals held that Section 630(b)'s directive that employer "also means" a political subdivision of a state is unambiguous. *Id.* 14a. Because "also" means "in addition," and political subdivisions are covered in a separate sentence that includes no numerosity requirement, the court of appeals determined that text plainly sets out political subdivisions as a distinct category from

the category to which the numerosity requirement applies. *Id.* 13a.

The Ninth Circuit noted that a 1986 Seventh Circuit decision—and a few other cases "rely[ing] entirely" on that decision—had held otherwise. Pet. App. 11a (citing *Kelly v. Wauconda Park Dist.*, 801 F.2d 269 (7th Cir. 1986), and other cases). The Seventh Circuit deemed Section 630(b) "ambiguous" with respect to the coverage issue and relied on the statute's legislative history and a comparison to Title VII to conclude that "Congress intended section 630(b) to apply the same coverage to both public and private employees." *Kelly*, 801 F.2d at 270-73.

The Ninth Circuit, however, found *Kelly*'s reasoning "underwhelming." Pet. App. 13a. In particular, "*Kelly* never explained" how applying the numerosity requirement to the political subdivision clause of the ADEA is a "'reasonable interpretation' of the statute's actual language." *Id.* (quoting *Kelly*, 801 F.2d at 270). Accordingly, the court of appeals held that "there is no valid justification to depart from the plain meaning of the language and to adopt another interpretation." *Id.* 14a.

The Ninth Circuit also rejected the Fire District's arguments based on legislative history and congressional intent. The Senate report that accompanied the 1974 ADEA amendment, the court of appeals explained, "never states that the twenty-employee minimum should apply to political subdivisions." Pet. App. 16a. And the Ninth Circuit refused to presume that Congress intended the ADEA to track the coverage of Title VII. To the contrary, the court of appeals explained that where, as here, "Congress use[s] different language" in the ADEA

than it does in Title VII, "such Congressional choice must be respected." *Id.* 15a (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013)).

Given its holding that the twenty-employee minimum does not apply to political subdivisions, the Ninth Circuit did not reach respondents' alternative argument that the Fire District had at least twenty employees.

REASONS FOR DENYING THE WRIT

The Fire District contends that there is an "intractable" disagreement over whether the ADEA's numerosity requirement applies to state political subdivisions and that the Ninth Circuit erred in holding that it does not. Pet. 11, 21. There is, however, no conflict that warrants this Court's review. The Court's intervening precedents have eclipsed the decades-old opinions that the Fire District cites. And the Ninth Circuit correctly read the ADEA's plain text as covering political subdivisions regardless of size—as would any court that considered the issue today. Besides, the ADEA's numerosity requirement would have no discernable impact on the primary conduct of public employers, and questions regarding its applicability in this context rarely arise. This case is also a poor vehicle for resolving the issue. It is in an interlocutory posture, and there are alternative grounds on which the Court could affirm the Ninth Circuit's decision. The petition should be denied.

I. There is no conflict that warrants this Court's intervention.

The Fire District's assertion that the Ninth Circuit's holding conflicts with decisions from four

other circuits is overblown. Indeed, the Fire District itself attacks the Ninth Circuit's reasoning primarily on grounds *no* court has yet considered, much less adopted.

1. As an initial matter, the Tenth Circuit case the Fire District cites, *Cink v. Grant County*, 635 Fed. Appx. 470 (10th Cir. 2015), cannot be part of any split. *Cink* is unreported and, therefore, "is not binding precedent." *Id.* at 470 n.*. Moreover, the Tenth Circuit's discussion of whether a numerosity requirement applies to political subdivisions is dicta. The defendant in that case—Grant County, Oklahoma—did not claim to have fewer than twenty employees. *Id.* at 474 & n.5.

2. The three remaining cases that the Fire District cites were all decided decades ago: *Kelly v. Wauconda Park District*, 801 F.2d 269 (7th Cir. 1986), and two others that adopt *Kelly*'s holding without further analysis, *Palmer v. Arkansas Council on Economic Education*, 154 F.3d 892 (8th Cir. 1998), and *EEOC v. Monclova Township*, 920 F.2d 360 (6th Cir. 1990). In light of this Court's intervening precedent, it is unlikely that those courts would have reached the same conclusion today.

a. The Seventh Circuit in *Kelly* acknowledged that "Congress used different language in defining employers under Title VII, as opposed to the ADEA." 801 F.2d at 271. It nonetheless insisted on construing the two statutes identically in light of "'important similarities' in objectives, substantive prohibitions, and legislative histories." *Id.* (citation omitted).

Since *Kelly* and the decisions adopting its reasoning, however, this Court has repeatedly prohibited courts from assuming without "careful and

critical examination," *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008), that rules applicable to Title VII apply to the ADEA. Instead, courts now "must focus on the text" of each statute. *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175 (2009).

In *Gross*, for example, a litigant "relie[d] on this Court's decisions construing Title VII for his interpretation of the ADEA." 557 U.S. at 173. The Court, however, refused to apply the Title VII rule to the ADEA because of "textual differences" in the relevant provisions of the two statutes. *Id.* at 175 & n.2. The Court "presumed" that Congress "ha[d] acted intentionally" when it amended the relevant Title VII provision but "neglected to add such a provision to the ADEA." *Id.* at 174. In other words, when there are differences between the texts of two federal antidiscrimination statutes, it is "incorrect to infer that Congress meant anything other than what the text does say." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2530 (2013).

"[W]hatever the merits of *Kelly*'s reasoning in 1986, it cannot be reconciled with [these] recent Supreme Court cases emphasizing repeatedly that rules from one anti-discrimination statute cannot be mechanically applied to the other statute." C.A. Br. of the EEOC as Amicus Curiae 11. The Seventh Circuit has implicitly recognized as much. A "statute-by-statute approach," it has explained, is most "faithful to the *Gross* Court's close scrutiny of the relevant text." *Smith v. Wilson*, 705 F.3d 674, 681 (7th Cir. 2013); *see also Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 319 (6th Cir. 2012) (en banc) (recognizing in light of *Gross* that "[s]hared statutory purposes do not invariably lead to shared statutory texts, and in the end it is the text that matters"). And

that is the approach the Ninth Circuit followed here. *See* Pet. App. 15a (citing *Nassar*, 133 S. Ct. at 2528-29).

b. More broadly, *Kelly* used an approach to statutory text that was common in 1986 but is no longer appropriate. The Seventh Circuit made no serious attempt to grapple with the ADEA's word choice or grammar, relegating its textual analysis to a mere footnote. *See Kelly*, 801 F.2d at 270-71 & n.1. Instead, it pronounced the statute ambiguous based on the abstract "reasonable[ness]" of applying the numerosity requirement to political subdivisions. *Id.* at 270-71. The Seventh Circuit then turned to a lengthy rendition of "the legislative history of the statute," from which it deduced that Congress's "main purpose" in amending the ADEA supported imposing a twenty-employee requirement. *Id.*

This Court has since shunned that approach to statutory interpretation. "In the past, the Court itself had asserted judicial power to reshape the letter of the law to make it cohere better with broader legislative purposes." John F. Manning, *The Supreme Court, 2013 Term—Foreword: The Means of Constitutional Power*, 128 Harv. L. Rev. 1, 4 (2014); *see also id.* at 16-17 (discussing examples up through 1989). "[T]oday's Court" generally "adher[es], instead, to the words of the statute." *Id.* at 4. It requires lower courts to consider the ordinary meaning of a statute's language and analyze its grammatical structure at a granular level before declaring ambiguity.

To select just one of scores of available examples: in *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002), the Court unanimously reversed the lower court's determination that a

statutory provision was ambiguous. Rejecting the lower court's resort to congressional purpose and legislative history, the Court applied "basic rules of grammar" and the dictionary definitions of the terms "any" and "or" to conclude that the plain text of the statute governed. *Id.* at 131-33; *see also, e.g.*, *Milner v. Dep't of the Navy*, 562 U.S. 562, 569-73 (2011) (rejecting a "text-light approach to the statute" in favor of one derived from dictionary definitions and the use of a statutory word "as an adjective"). Even when a statute's plain text produces counterintuitive results, courts now must "enforc[e] the statutory text, warts and all." Manning, *The Means of Constitutional Power*, at 6; *see also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 459-61 (2002).

As the Ninth Circuit recognized, "*Kelly*'s focus on divining congressional intent, rather than determining the ordinary meaning of the text" is out of step with current statutory interpretation case law. Pet. App. 15a. No court today would analyze statutory text the way the Seventh Circuit in 1986 approached the ADEA's coverage provision.

3. Implicitly recognizing that the reasoning of *Kelly* and the cases following it cannot be defended in today's jurisprudential landscape, the Fire District advances ten pages' worth of textual arguments in support of its position. *See* Pet. 21-31. But the Fire District presented none of these arguments to the Ninth Circuit. And no other court has addressed any of them either. If indeed "the question presented is sure to recur," *id.* 20, courts should be given time to consider the new arguments the Fire District makes.

In the meantime, allowing further percolation will subject no entities to conflicting obligations.

Unlike corporations, every political subdivision is necessarily confined to a particular state. Therefore, those employers are subject only to the law of a particular circuit, whatever it may be.

II. The question whether the ADEA's numerosity requirement applies to political subdivisions is not significant enough to merit review.

The question whether a numerosity requirement applies under the ADEA to political subdivisions does not affect employment practices in such subdivisions. Nor does the issue arise frequently in litigation.

A. The scope of the ADEA's coverage does not affect the primary conduct of political subdivisions.

1. Across the country, the question the Fire District presents lacks any real import because state laws typically forbid all political subdivisions—regardless of size—from discriminating against employees on the basis of age. Consider, for example, the Ninth Circuit, where the Fire District suggests that employers will face new burdens as a result of the decision here. *See* Pet. 20-21. Most of the states in the Ninth Circuit already have laws banning age discrimination that cover *all* employees of state and political subdivisions.[1] Only Arizona and Nevada have employee numerosity requirements that apply

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[1] *See* Alaska Stat. §§ 18.80.220(a), 18.80.300(5); Cal. Gov't Code §§ 12926(d), 12940(a); Haw. Rev. Stat. §§ 378-1, 378-2(a); Idaho Code §§ 67-5902(6), 67-5909; Mont. Code §§ 49-2-101(11), 49-2-303(1); Or. Rev. Stat. §§ 659A.001(4), 659A.030(1); Wash. Rev. Code § 49.44.090 & *Bennett v. Hardy*, 784 P.2d 1258, 1260 (Wash. 1990) (construing statute).

to political subdivisions. And even these states have lower thresholds than the twenty-employee limit the Fire District seeks here. *See* Ariz. Rev. Stat. §§ 41-1461(6), 41-1463(B) (fifteen employees); Nev. Rev. Stat. §§ 613.310(2), 613.310(6), 613.330(1) (same).

The same is true for the overwhelming majority of the states in the Sixth, Seventh, and Eighth Circuits, which the Fire District says are governed by the *Kelly* rule. The Fire District, for instance, expresses concern for political subdivisions in Illinois. *See* Pet. 20 n.5. But Illinois law already prohibits age discrimination by "any" political subdivision, "without regard to the number of employees." 775 Ill. Comp. Stat. 5/2-101(B)(1)(c); *see also id.* 5/1-102(A), 5/2-102(A). Indeed, all but three states in those circuits have laws that protect all employees of political subdivisions.[2] Two of the remaining three have numerosity requirements far lower than twenty. *See* Iowa Code § 216.6(1), (6) (four employees); Ky. Rev. Stat. §§ 344.030(2), 344.040 (eight). Only South Dakota does not independently protect employees from discrimination on the basis of age. *See* S.D. Codified Laws § 20-13-10.

2. In any event, the Fire District does not contend that political subdivisions with fewer than

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[2] Ark. Code §§ 21-3-201, 21-3-203; 775 Ill. Comp. Stat. 5/1-102(A), 5/2-101(B)(1)(c), 5/2-102(A); Ind. Code §§ 22-9-2-1, 22-9-2-2; Mich. Comp. Laws §§ 37.2201(a), 37.2202; Minn. Stat. §§ 363A.03(16), 363A.08; Mo. Rev. Stat. §§ 213.010(8), 213.055; Neb. Rev. Stat. §§ 48-1002(2), 48-1004; N.D. Cent. Code §§ 14-02.4-02(8), 14-02.4-0.3; Ohio Rev. Code §§ 4112.01(A)(2), 4112.14; Tenn. Code §§ 4-21-102(5), 4-21-407; Wis. Stat. §§ 111.32(6)(a), 111.321, 111.322.

twenty employees *want* to make employment decisions that the ADEA would otherwise prohibit. Rather, the Fire District identifies only one way in which the issue it raises purportedly affects the behavior of small political subdivisions—namely, that federal lawsuits against such entities would "threaten[] the continued availability" of local government services by imposing "new financial burdens" on the subdivisions. Pet. 21.

That argument is unfounded. The vast majority of public entities participate in insurance pools that cover employment discrimination lawsuits. Karen Nixon, Pub. Agency Risk Sharing Auth. of Cal., *Public Entity Pooling—Built to Last* 3 (Dec. 16, 2011), http://www.cajpa.org/documents/Public-Entity-Pooling-Built-to-Last.pdf (noting that 85% of counties, townships, municipalities, school districts, and special districts nationwide participate in risk pools). And the smaller the public employer, the more likely it is to be part of such a pool. Given the ubiquity of this insurance, any ADEA lawsuits that might be filed are unlikely to prevent small political subdivisions from fulfilling their missions.

B. The question presented does not arise frequently.

Notwithstanding the Fire District's back-of-the-envelope estimates regarding the number of political subdivisions, *see* Pet. 20, the question whether a numerosity requirement applies to such entities is rarely litigated. In the forty-three years since the ADEA's 1974 amendment, only four courts of appeals have needed to address the issue. *See supra* at 7.

There are good reasons why this is so. As just noted, state laws already typically bar all political

subdivisions from discriminating on the basis of age. And precisely because offices with fewer than twenty employees do not employ many workers, they will not generate many ADEA claims.

Even when someone who worked for a political subdivision with fewer than twenty employees brings an ADEA claim, it will often be immaterial whether the statute's numerosity requirement applies to political subdivisions. Employees who worked for these small political subdivisions may still bring suit under the ADEA against either (1) a larger, related entity or (2) the political subdivision itself if it is "integrated" with another office. The Tenth Circuit decision cited by the Fire District exemplifies the first point: The court held that an employee who worked in a sheriff's office with fewer than twenty employees could instead sue the county in which the office was located because the sheriff's office was a "subordinate department" of Grant County. *Cink v. Grant County*, 635 Fed. Appx. 470, 474-76 (10th Cir. 2015).

Second, an office with fewer than the requisite number of employees can sometimes itself be sued. The EEOC directs across all antidiscrimination statutes that even "[i]f an employer does not have the minimum number of employees to meet the statutory requirement, it is still covered if it is part of an 'integrated enterprise' that, overall, meets the requirement." EEOC Compl. Man. § 2-III(B)(1)(a)(iii) (last updated 2009), https://www1.eeoc.gov/policy/docs/threshold.html. And numerous courts have found small employers to satisfy numerosity requirements on that ground. *See, e.g.*, *Echevarria v. Insight Med., P.C.*, 72 F. Supp. 3d 442, 454-56, 458-62 (S.D.N.Y. 2014) (holding that two employers should be considered a "single integrated employer"); *Arroyo-*

Pérez v. Demir Grp. Int'l, 762 F. Supp. 2d 374, 385-88 (D.P.R. 2011) (same); *French v. Idaho State AFL-CIO*, 164 F. Supp. 3d 1205, 1215 (D. Idaho 2016) (denying motion to dismiss on this basis).

The issue the Fire District presents is relevant, in short, only in the atypical circumstance when a political subdivision with fewer than twenty employees faces an ADEA lawsuit and does not have a relationship with another office that would bring the total number of employees over twenty.

III. The Ninth Circuit's decision is correct.

A. The plain language of the ADEA dictates that it covers all political subdivisions.

The plain language of the ADEA is unambiguous. The relevant provision first provides that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees." 29 U.S.C. § 630(b). It then says: "The term also means . . . (2) a State or political subdivision of a State." *Id.*

The "State or political subdivision of a State" clause, which was added through the 1974 amendment, makes clear that the ADEA covers political subdivisions regardless of size. The clause is set off by the word "also," and the ordinary meaning of "also" is "in addition." *See, e.g.*, American Heritage Dictionary 53 (4th ed. 2000); Random House Dictionary of the English Language 60 (2d ed. 1987). Furthermore, the clause—unlike the subsection covering private employers—lacks any language requiring a certain number of employees. Thus, as the Ninth Circuit recognized, the political subdivision clause brings a separate category of "employer"

within the statute's reach; "it does not clarify" the other categories. Pet. App. 7a.

This conclusion is reinforced by the fact that Congress clearly "knows how to impose" numerosity requirements on political subdivisions "when it wishes to do so," *Whitfield v. United States*, 543 U.S. 209, 216 (2005). Two years before the amendment adding the political subdivisions clause to the ADEA, Congress amended the text of Title VII to cover political subdivisions. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 80 Stat. 662 (codified as amended at 42 U.S.C. § 2000e). It did so not by creating another category of employer, but by adding "governments, governmental agencies, political subdivisions" into the provision defining "persons." Congress thereby guaranteed that Title VII's numerosity requirement would apply to those governmental "persons" as well. *Id.*

In the ADEA, Congress could have applied the numerosity requirement to public employers by adding the "State or political subdivision of a State" language to the definition of "person" in Section 630(a), as it had in Title VII. But Congress did not do so. Both "Congress' choice of words" and "its structural choices" are "presumed to be deliberate." *Univ. of Tex. Sw. Med. v. Nassar*, 133 S. Ct. 2517, 2529 (2013). A court may not "ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA." *Gross v. FBL Fin. Servs.*, 557 U.S 167, 174 (2009). Therefore, the only reasonable conclusion is that the ADEA's numerosity requirement does not extend to political subdivisions.

B. The Fire District's counterarguments are unavailing.

The Fire District attacks the Ninth Circuit's analysis with various arguments based on (1) the ADEA's text and (2) the statute's legislative history. None of these arguments is availing.

1. *Text.* The Fire District advances three new textual arguments. If there were merit to these arguments, they would at best warrant percolation. *See supra* at 10-11. In any event, the new arguments are wrong.

a. The Fire District first argues that reading the political subdivisions clause as identifying a distinct category of employer requires also reading the clause in the same provision of the ADEA covering "agent[s] of such a person" as creating a distinct category of employer. Pet. 22. The Fire District contends that this is inconsistent with understanding the agent clause to be an "unremarkable expression of respondeat superior." *Id.* 23 (citation omitted).

But there is no inconsistency in both treating "agent[s] of such a person" as a distinct category of employer and also treating that phrase as an "unremarkable expression of respondeat superior." The agent clause describes only which employers are prohibited from discriminating. It does not dictate who is responsible for paying any judgment. Therefore, courts may allow individuals to "be named as defendants in their representative or official capacities for the purposes of respondeat superior liability," while still "reject[ing] the notion of individual liability under the ADEA." *Leykis v. NYP Holdings, Inc.*, 899 F. Supp. 986, 991 (E.D.N.Y. 1995); *see also Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583,

587 (9th Cir. 1993) (observing that courts holding that individuals may be sued "actually have held individuals liable only in their *official* capacities and not in their individual capacities").

By contrast, the Fire District's reading of Section 630(b)(1) fails to preserve the agent clause as merely importing respondeat superior liability. A premise of the Fire District's argument is that the political subdivision clause and the agent clause must be read symmetrically. So if, as the Fire District contends, the numerosity requirement applied to the political subdivisions clause, then it would also have to apply to the agent clause. The Fire District's reading would therefore impose an independent and additional requirement to prove liability for the acts of an agent; respondeat superior would not necessarily apply.

b. In the Ninth Circuit, "[t]he parties agree[d]" "that the term 'person' does not include a political subdivision of a State." Pet. App. 5a. But the Fire District now makes an about-face. It argues political subdivisions are covered "employers" because they are implicitly included within the definition of "person" in Section 630(a), which in turn includes the catch-all "any organized groups of persons." Pet. 26. That being so, the Fire District continues, the Ninth Circuit's reading of Section 630(b)(2) as "separately defin[ing] *all* political subdivisions as employers" is improperly redundant. Pet. 25.

But the "organized groups of persons" catch-all does not encompass political subdivisions. "However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222,

228 (1957) (internal quotation marks and citations omitted); *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("[T]he specific governs the general 'particularly when the two are interrelated and closely positioned, both in fact being parts of [the same statutory scheme].'" (second alteration in original) (quoting *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam))). And here, Section 630(b)(2) specifically—indeed, explicitly—covers political subdivisions as "employers." It therefore governs the ADEA's coverage of political subdivisions.

c. The Fire District's last textual argument posits that Judge O'Scannlain's opinion for the Ninth Circuit was insensitive to federalism. According to the Fire District, the Ninth Circuit impermissibly construed Section 630(b) to alter the "balance between federal and State powers" without a "clear statement" of Congress's intent to intrude on state interests. Pet. 30-31.

The clear statement rule, however, can come into play only when necessary "to resolve ambiguity in a federal statute." *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014). Because Section 630(b) is unambiguous, the rule cannot apply.

At any rate, any federalism interest here is negligible at best. A clear statement is required only when federal law implicates "a decision of the most fundamental sort for a sovereign entity." *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 n.5 (1995) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). Such is not the case here. The Fire District does not contend that the Ninth Circuit's holding affects a state's ability to regulate its own

employees. Rather, the Fire District contends only that the Ninth Circuit's holding displaces state authority over local political subdivisions. Pet. 31. But as this Court has explained, no clear statement rule applies to federal laws restricting "a State's authority to set the conditions upon which its political subdivisions are subject to suit." *Jinks v. Richland County*, 538 U.S. 456, 466-67 (2003).

2. *Legislative history.* Because Section 630(b) is unambiguous, legislative history should not be introduced to "muddy [the] clear statutory language," *Milner v. Dep't of the Navy*, 562 U.S. 562, 572 (2011). In any case, the legislative history does not support the Fire District's reading of the statute.

a. Relying on statements from a single senator, the Fire District suggests it would contravene the legislative history of the ADEA to treat public and private employers differently. Pet. 32. But all that senator said was that the ADEA's 1974 amendment would entitle public employees to the "same protections against arbitrary employment" as private employees. 120 Cong. Rec. 8768 (1974) (statement of Sen. Bentsen). The senator's statements simply explain that the ADEA amendment would protect public employees; they say nothing specifically about which public employers would be covered.

On that issue of coverage, the legislative history supports the Ninth Circuit's decision. The United States Senate Special Committee on Aging "urged that the law be extended, at the earliest possible date, to include (1) Federal, State, and local governmental employees, and (2) employers with 20 or more employees." S. Special Comm. on Aging, 93d Cong., *Improving the Age Discrimination Law* 18

(Comm. Print 1973). The fact that this report separated these two categories demonstrates that Congress did not intend the numerosity requirement to apply to public employers.

Contrary to the Fire District's suggestion (Pet. 32-33), there is nothing "puzzling" about covering all public employers while covering private employers only when they have twenty or more employees. Many state laws barring age discrimination cover all political subdivisions while exempting small private employers from their reach. *See supra* at 11-12 (collecting citations). As the Ninth Circuit observed, the 1974 Congress, like these states, may have intended public employers to serve as models of nondiscrimination. *See* Pet. App. 16a n.10. Alternatively, Congress may have thought that government agencies—no matter their size—can better bear the costs of lawsuits than small businesses. *See id.*

b. Notwithstanding the textual differences between the ADEA and Title VII, the Fire District maintains that the ADEA should not cover more political subdivisions than Title VII, while also covering fewer private employers. Pet. 34.

But any purported disjuncture between the ADEA and Title VII cannot justify judicially amending the ADEA to apply its numerosity requirement to political subdivisions. "[T]his Court does not revise legislation . . . just because the text as written creates an apparent anomaly as to some subject it does not address." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014).

Moreover, the Fire District's assumption that Congress could not have intended the ADEA to be

broader than Title VII is simply mistaken. For example, the ADEA allows "much broader" relief than Title VII. *House v. Cannon Mills Co.*, 713 F. Supp. 159, 160 (M.D.N.C. 1988); *compare* 29 U.S.C. § 626(b) (ADEA), *with* 42 U.S.C. § 2000e-5(g) (Title VII). True, the ADEA's coverage of *private* employers is narrower than Title VII's. *See* Pet. 34. But that just reinforces that the two statutes plainly differ in a variety of ways—and that each statute's text should control on its own terms. *See supra* at 7-8, 16.

IV. This case does not present an appropriate vehicle for the Court to decide the question the Fire District presents.

Even if the numerosity issue the Fire District raises were otherwise worthy of this Court's attention, this case is a poor vehicle for addressing it.

1. The interlocutory posture here "alone furnishe[s] sufficient ground for denial" of the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari). That practice promotes judicial efficiency. If a judgment is entered against the party that is seeking interlocutory review, it can present all of its arguments to the Court in a single petition. *Id.*; *see also Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

2. Regardless of whether the numerosity requirement applies to the Fire District, the Fire District was a covered "employer" under the ADEA because it had more than twenty employees.

When counting "employees" for purposes of numerosity requirements in antidiscrimination statutes, courts "look first and primarily to whether the individual in question appears on the employer's payroll." *Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 211 (1997). Courts also apply "traditional principles of agency law" to confirm "the existence of an employment relationship." *Id.* When conducting this agency inquiry, "no one factor [is] decisive." *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 451 (2003) (citation omitted).

In concluding that the Fire District had at most "19 qualifying employees," Pet. App. 26a, the district court improperly limited *Walters* and ignored *Clackamas*. Although more than twenty firefighters were listed on the Fire District's payroll, the district court stressed that some firefighters listed on the payroll here "did not perform work and receive pay from the employer during the pertinent time frame." *Id.* 26a-27a, 30a. But here, as in *Walters*, traditional agency principles confirm that the individuals in dispute were employees. Those firefighters were under the "control" of the Fire District because, as petitioner has acknowledged, they were "on-call to work when a fulltime firefighter [wa]s unavailable or the Fire District [wa]s short-staffed." Appellee's C.A. Answering Br. 21; *see Clackamas*, 538 U.S. at 448 (describing "control" as the "principal guidepost" of traditional agency law analysis).

Additionally, the district court erred by not counting volunteer firefighters as employees on the ground that they did not receive "substantial benefits." Pet. App. 37a. At least two of those firefighters received pension benefits, were entitled to workers' compensation, and received training and

experience that could lead to full-time employment. *Id.* 36a-37a. At any rate, under *Clackamas*'s multifactor test, individuals need not receive substantial benefits to count as "employees." *See Clackamas*, 538 U.S. at 445 n.5, 449; *see also Fichman v. Media Ctr.*, 512 F.3d 1157, 1160 (9th Cir. 2008) (applying *Clackamas* to the ADEA). And other circumstances here indicate that the volunteer firefighters had an employment relationship with the Fire District. *See Bryson v. Middlefield Volunteer Fire Dep't, Inc.*, 656 F.3d 348, 354-56 (6th Cir. 2011) (holding that defendant fire district was not entitled to summary judgment against volunteer firefighters on Title VII numerosity grounds).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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